133

(6)

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

PAUL D. CLEMENT
Counsel of Record
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20006
(202) 737-0500
pclement@kslaw.com
Counsel for Respondents

JEFFREY W. SARLES
Counsel of Record
MAYER BROWN LLP
71 S. WACKER DR.
CHICAGO, IL 60606
(312) 782-0600
jsarles@mayerbrown.com
Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

PETITION FOR CERTIORARI FILED FEBRUARY 18, 2009
CERTIORARI GRANTED APRIL 20, 2009

doc 2
HASTUC 4TQELQ

TABLE OF CONTENTS

	Page
Relevant Docket Entries in the District Court in No. 4:05-CV-00255	1
Relevant Docket Entries in the District Court in No. 4:05-CV-00178	9
Relevant Docket Entries in the Court of Appeals	17
Police Reports, Police Department, Council Bluffs, Iowa	21
Preliminary Information, Pottawattamie County, Iowa District Court, dated Nov. 17, 1977	54
Plaintiff Terry Harrington's Statement of Additional Material Facts that Preclude Summary Judgment	55
Reply to Harrington's Statement of Additional Facts by Pottawattamie County, and Prosecutors Hrvol, Richter, and Wilber	72
Order (S.D. Iowa Feb. 27, 2007)	76

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Curtis W. McGhee, Jr. v. Pottawattamie County, Iowa, et al., No. 4:05-CV-00255

Relevant docket entries

Docket No.	Date	General Description
1	05/04/2005	COMPLAINT against all defendants, filed by Curtis W. McGhee, Jr. Rule 16 Notice of Dismissal set for 9/1/2005. Notice of Dismissal for lack of Service deadline set for 9/1/2005. (Attachments: #1 Complaint Signature Page 1#2 Complaint Signature Page 2) (Olson, Alan) (Entered: 05/04/2005)
36	12/01/2005	AMENDED ANSWER to Complaint (*First Amended Answer and Jury Demand of Defendants Pottawattamie County, City of Council Bluffs, Hrvol, Richter, Wilber, Larsen, Brown and Dawson to Complaint of Curtis W. McGhee, Jr.*) by David Stephen Baker on behalf of Pottawattamie County, Iowa, The City of Council Bluffs, Iowa, Joseph

Docket No.	Date	General Description
		HRVOL, DAVID RICHTER, WILBER MATTHEW, DANIEL LARSEN, LYLE BROWN, DAVID DAWSON. (Baker, David) (Entered: 12/01/2005)
95	09/29/2006	MOTION for Summary Judgment by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 10/23/2006 (Attachments: #1 Statement of Material Facts #2 Appendix) (Madsen, Kristopher) (Entered: 09/29/2006)
111	10/27/2006	RESPONSE to Motion re 95 MOTION for Summary Judgment filed by Curtis W. McGhee, Jr. Replies due by 11/8/2006. (Attachments: #1 Appendix Plaintiff McGhee's Appendix to Response to Defendants' Motion for Summary Judgment: OVERLENGTH Filed in paper form and maintained in the Clerk's Office in DSM) (Davis, Stephen) Modified on 11/2/2006 add appendix text (don,). (Entered: 10/27/2006)

Docket No.	Date	General Description
112	10/27/2006	RESPONSE to Motion re 95 MOTION for Summary Judgment *Response to Statement of Material Facts* filed by Curtis W. McGhee, Jr. Replies due by 11/8/2006. (Davis, Stephen) (Entered: 10/27/2006)
123	11/15/2006	Unresisted MOTION to file overlength brief *Reply Brief* Motions referred to Thomas J. Shields. by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 12/4/2006 (Attachments: #1 Reply Brief in Support of Motion for Summary Judgment) (Madsen, Kristopher) (Entered: 11/15/2006)
124	11/15/2006	AMENDED DOCUMENT by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. *Supplemental Appendix for Summary Judgment.* (Madsen, Kristopher) (Entered: 11/15/2006)
133	12/01/2006	MOTION for Leave to File *Surreply Brief on County And Prosecutors' Motion for Summary Judgment* Motions re-

Docket No.	Date	General Description
		ferred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 12/18/2006 (Attachments: #1 Supplement Surreply Brief #2 Supplement Response to Defendants' Statements of Additional Facts #3 Appendix Supplemental Appendix in Response to Motion for Summary Judgment #4 Supplement Certificate of Service) (Davis, Stephen) (Entered: 12/01/2006)
	12/05/2006	PUBLIC DOCKET ANNOTATION Paper copies of Plaintiff's supplemental Appendix w/exhibits 42-101 received in Clerks Office Des Moines. (gk,) (Entered: 12/05/2006)
146	01/18/2007	MOTION To Join *Plaintiff Harrington's Rule 104 Motion for Judicial Admission of Fact* Motions referred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 2/5/2007 (Attachments: #1 Supplement Memorandum in Support of Motion to Join) (Davis, Stephen) (Entered: 01/18/2007)
183	02/23/2007	ORDER granting in party and

Docket No.	Date	General Description
		denying in part 95 Motion for Summary Judgment; granting 99 Motion for Judgment on the Pleadings; granting in part and denying in part 100 Motion for Judgment as a Matter of Law; granting 133 Motion for Leave to File. Signed by Judge Robert W. Pratt on 02/23/2007. (mlm,) Modified on 02/23/2007 to edit text doc. #99 (id). (Entered: 02/23/2007)
188	02/27/2007	NOTICE OF INTERLOCUTORY APPEAL as to 183 Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion for Judgment as a Matter of Law, Order on Motion for Leave to File,,,,by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER. Filing Fee $455, receipt number 403096. (Attachments: #1 Appellant's Form A) (Madsen, Kristopher) (Entered: 02/27/2007)
193	02/27/2007	ORDER ON MOTIONS. Signed by Judge Robert W. Pratt on 02/27/2007. (mlm,)

Docket No.	Date	General Description
		(Entered: 02/27/2007)
211	03/02/2007	MOTION for Judgment on the Pleadings (*Brief in support thereof*) 202 by Pottawattamie County, Iowa. Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 03/19/2007 (Madsen, Kristopher) Modified on 3/5/2007 to include link to original motion (rmj). (Entered: 03/02/2007)
212	03/08/2007	NOTICE OF INTERLOCUTORY APPEAL as to 183 Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion for Judgment as a Matter of Law, Order on Motion for Leave to File,,,, by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Filing fee $455, receipt number 407963. (Attachments: #1 Appellant's Form A) (Madsen, Kristoher) (Entered: 03/08/2007)
217	03/19/2007	RESPONSE to Motion re 211 MOTION for Judgment on the Pleadings (*Brief in support*

Docket No.	Date	General Description
		thereof) MOTION for Judgment on the Pleadings (*Brief in support thereof*), 201 MOTION in Limine *Re Damages Plaintiffs' Joint Brief in Opposition to Defendants' Motion for Judgment on the Pleadings Under Wallace v. Kato And in Response to Their Motion in Limine Regarding Damages* filed by Curtis W. McGhee, Jr. Replies due by 3/29/2007. (Davis, Stephen) (Entered: 03/19/2007)
228	04/10/2007	Joint MOTION for Leave to File *Plaintiffs' Surreply on County, Hrvol & Richter's Motion for Judgment on the Pleadings Under Wallace v. Kato* Motions referred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 4/27/2007 (Attachments: #1 Surreply #2 Exhibit 1-3) (Davis, Stephen) (Entered: 04/10/2007)

Docket No.	Date	General Description
232	04/27/2007	BRIEF of *Pottawattamie County, Joseph Hrvol, and David Richter in Opposition to Plaintiffs' Motion to File Joint Surreply*. (Madsen, Kristopher) (Entered: 04/27/2007)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Terry Harrington v. Pottawattamie County, Iowa, et al., No. 4:05-CV-00178

Relevant docket entries

Docket No.	Date	General Description
1	03/25/2005	COMPLAINT against all defendants, filed by Terry Harrington. Rule 16 Notice of Dismissal set for 7/25/2005. Notice of Dismissal for lack of Service deadline set for 7/25/2006. (McCalla, J) (Entered: 03/25/2005).
47	12/01/2005	AMENDED ANSWER to Complaint (*First Amended Answer and Jury Demand of Defendants Pottawattamie County, City of Council Bluffs, Richter, Hrvol, Larsen and Brown to Complaint of Terry Harrington*) by David Stephen Baker on behalf of Council Bluffs, IA, City of, David E. Richter, Joseph J. Hrvol, Daniel C. Larsen, Lyle W. Brown, Pottawattamie County, Iowa. (Baker, David) (En-

Docket No.	Date	General Description
		tered: 12/01/2005)
93	10/03/2006	MOTION for Summary Judgment by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Responses due by 10/27/2006 (Attachments: #1 Statement of Material Facts #2 Appendix) (Madsen, Kristopher) (Entered: 10/03/2006)
101	10/27/2006	NOTICE by Terry Harrington *to Supplement Record (attachments to Notice being mailed via U.S. Mail)* (Orchard, Mel) (Entered: 10/27/2006)
102	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment (*statement of material facts by Pottawattamie County and Prosecutors Hrvol, Richter and Wilber*) filed by Terry Harrington. Replies due by 11/8/2006. (Orchard, Mel) (Entered: 10/27/2006)
104	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment *Additional 340 pages to follow via Federal Express* filed by Terry Harrington. Replies due by 11/8/2006. (At-

Docket No.	Date	General Description
		tachments: #1 Appendix) (Orchard, Mel) (Entered: 10/27/2006)
105	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment filed by Terry Harrington. Replies due by 11/8/2006. (Attachments: #1 #2) (Orchard, Mel) (Entered: 10/27/2006)
	10/30/2006	PUBLIC DOCKET ANNOTATION; appendix to pltff Harrington's response to motion for summary judgment by Pottawattamie County etc – see doc 105-3 – received in paper form this date in the clerk's office and will be maintained in the clerk's office (ljf) (Entered: 10/30/2006)
	10/30/2006	PUBLIC DOCKET ANNOTATION; plaintiff Harrington's notice of supplemental record – see doc 101 – received this date in paper form in the clerk's office and will be maintained in the clerk's office. (ljf,) (Entered: 10/30/2006)
111	11/15/2006	Unresisted MOTION to file overlength brief *Reply Brief* Motions referred to Thomas J.

Docket No.	Date	General Description
		Shields, by David E. Richter, Joseph J. Hrvol, Pottawattamie county, Iowa. Responses due by 12/4/2006 (Attachments: #1 Reply Brief in Support of Motion for Summary Judgment) (Madsen, Kristopher) (Entered: 11/15/2006)
112	11/15/2006	REPLY *to Harrington's Statement of Additional Facts* re 102 Response to Motion filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (Madsen, Kristopher) (Entered: 11/15/2006)
113	11/15/2006	AMENDED DOCUMENT by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. *Supplemental Appendix for Summary Judgment.* (Madsen, Kristopher) (Entered: 11/15/2006)
115	11/20/2006	REPLY Brief re 93 MOTION for Summary Judgment filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (dv,) (Entered: 11/20/2006)
123	01/16/2007	MOTION Rule 104 Motion for Judicial Admission of Fact Motions referred to Thomas J.

Docket No.	Date	General Description
		Shields. by Terry Harrington. Responses due by 2/2/2007 (Attachments: #1 Exhibit Exhibit A to Plaintiff Terry Harrington's Rule 104 Motion for Judicial Admission of Fact #2 Exhibit Exhibit B to Plaintiff Terry Harrington's Rule 104 Motion for Judicial Admission of Fact) (Orchard, Mel) (Entered: 01/16/2007)
135	01/30/2007	RESPONSE to Motion re 123 MOTION Rule 104 Motion for Judicial Admission of Fact filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Replies due by 2/9/2007. (Livingston, Robert) (Entered: 01/30/2007)
150	02/09/2007	REPLY *Plaintiff Reply to Defendants Resistance to Harrington's Rule 104 Motion for Judicial Admission of Fact* re 135 Response to Motion filed by Terry Harrington. (Orchard, Mel) (Entered: 02/09/2007)
174	02/23/2007	ORDER granting in part and denying in part 90 Motion for Judgment on the Pleadings; granting in part and denying

Docket No.	Date	General Description
		in part 93 Motion for Summary Judgment. Signed by Judge Robert W. Pratt on 2/23/2007. (mlm,) (Entered: 02/23/2007)
176	02/23/2007	Proposed Pretrial Order *Joint Proposed Pretrial Conference Order* by Terry Harrington. (Attachments: #1 Exhibit Plaintiff Terry Harrington's Exhibit List #2 Exhibit Plaintiff Curtis McGhee's Exhibit List #3 Exhibit Defendant's Joint Exhibit List) (Orchard, Mel) (Entered: 02/23/2007)
185	02/26/2007	NOTICE OF INTERLOCUTORY APPEAL as to 174 Order on Motion for Judgment on the Pleadings, Order on Motion for Summary Judgment by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Filing fee $455, receipt number 402961. (Attachments: #1 Appellant's Form A) (Madsen, Kristopher) (Entered: 02/26/2007)
191	02/27/2007	ORDER ON MOTIONS. Signed by Judge Robert W. Pratt on 2/27/2007. (mlm,) (Entered: 02/27/2007)

Docket No.	Date	General Description
211	03/02/2007	MOTION for Judgment on the Pleadings (*Brief in support thereof*) by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Responses due by 3/19/2007 (Madsen, Kristopher) (Entered: 03/02/2007)
215	03/19/2007	RESPONSE to Motion re 211 MOTION for Judgment on the Pleadings (*Brief in support thereof*), 197 MOTION in Limine *Re Damages Plaintiffs' Joint Brief in Opposition to Defendant's Motion for Judgment on the Pleadings Under Wallace v. Kato And in Response to Their Motion in Limine Regarding Damages* filed by Terry Harrington. Replies due by 3/29/2007. (Davis, Stephen) (Entered: 03/19/2007)
222	03/29/2007	REPLY *Brief in Support of 12(c) Motion for Judgment on the Pleadings under Wallace v. Kato* re 196 MOTION for Judgment on the Pleadings *re Wallace statute of limitations* filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (Madsen, Kris-

Docket No.	Date	General Description
		topher) (Entered: 03/29/2007)
225	04/10/2007	Joint MOTION for Leave to File *Plaintiffs' Surreply on County, Hrvol & Richter's Motion for Judgment on the Pleadings Under Wallace v. Kato* Motions referred to Thomas J. Shields. by Terry Harrington. Responses due by 4/27/2007 (Attachments: #1 Surreply #2 Exhibit 1-3) (Davis, Stephen) (Entered: 04/10/2007)
229	04/27/2007	BRIEF of *Pottawattamie County, Joseph Hrvol, David Richter in Opposition to Plaintiffs' Motion to File Joint Surreply*. (Madsen, Kristopher) (Entered: 04/27/2007)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Curtis W. McGhee, Jr., et al. v. Pottawattamie County, Iowa, et al., Nos. 07-1453, 07-1524

Relevant docket entries

Date	General Description
03/09/2007	Originating court document filed consisting of notice of appeal, docket entries, and order dated 2/23/07. [3286662] [07-1524] (BNS)
11/15/2007	ARGUED & SUBMITTED in St. Louis to Judges William Jay Riley; A. Wallace Tashima; Lavenski R. Smith. Mr. Stephen Sanders for Appellants Pottawattamie County, David Richter, Mr. Joseph Hrvol and County of Pottawattamie, Mr. Stephen D. Davis for Appellee Mr. Curtis W. McGhee, Jr. and Mr. Mel C. Orchard, III for Appellee Mr. Terry Harrington in 07-1453, Mr. Stephen Sanders for Appellant Mr. Matthew Wilber, Mr. Stephen D. Davis for Appellee Mr. Curtis W. McGhee, Jr. and Mr. Mel C. Orchard, III for Appellee Mr. Terry Harrington in 07-1524. Rebuttal by Mr. Stephen Sanders for Pottawattamie County, David Richter, Mr. Joseph Hrvol and County of Pottawattamie in 07-1453, Mr. Stephen

Date	General Description
	Sanders for Mr. Matthew Wilber in 07-1524 RECORDED [3373204] [07-1453, 07-1524] (BWB)
02/01/2008	OPINION FILED – THE COURT: WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH. William Jay Riley, Authoring Judge (PUBLISHED) [3398008] [07-1453, 07-1524] (PAW)
02/01/2008	JUDGMENT FILED – The judgment of the originating court is AFFIRMED in part and REVERSED in part in accordance with the opinion. WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH Hrg Nov 2007 [3398014] [07-1453, 07-1524] (PAW)
02/29/2008	PETITION for enbanc rehearing filed by Appellants County of Pottawattamie, Mr. Joseph Hrvol, Mr. Joseph Hrvol, Pottawattamie County, David Richter and David Richter in 07-1453, w/service 02/29/2008. [3408454] [07-1453, 07-1524] (SS)
03/20/2008	CLERK LETTER sent notifying that party has an opportunity to respond to [3408454-2]: petition for enbanc rehearing. [3415193] [07-1453, 07-1524] (PAW)

Date	General Description
03/31/2008	RESPONSE in opposition to petition for enbanc rehearing, [3408454-2] filed by Appellee Mr. Curtis W. McGhee, Jr. in 07-1453, w/service 03/31/2008. [3418632] [07-1524, 07-1453] (WHJ)
03/31/2008	RESPONSE in opposition to petition for enbanc rehearing, [3408454-2] filed by Appellee Mr. Terry Harrington in 07-1453, 07-1524, w/service 03/31/2008. [3418755] [07-1453, 07-1524] (MCO)
04/11/2008	REPLY to response, [3418755-2], filed by Appellant Pottawattamie County in 07-1453. w/service 04/07/2008. [3422836] [07-1453, 07-1524] (PAW)
04/22/2008	JUDGE ORDER: Granting [3423930-2] motion to file a surreply filed by Appellee Mr. Terry Harrington. in 07-1453 Hrg Nov 2007 [3425977] [07-1453, 07-1524] (Paw)
05/15/2008	CASE REOPENED 1 REOPEN [07-1453, 07-1524] (PAW)
05/15/2008	CASE SUBMITTED On the briefs not on calendar before Judges William Jay Riley, A. Wallace Tashima, Lavenski R. Smith (Panel case data updated for cases: 07-1453) in St. Louis [07-1453, 07-1524] (PAW)
11/21/2008	OPINION FILED – THE COURT: WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH.

Date	General Description
	William Jay Riley, Authoring Judge (PUBLISHED) [3492337] [07-1453, 07-1524] (PAW)
11/21/2008	JUDGMENT FILED – The judgment of the originating court is AFFIRMED in part, REVERSED in part and REMANDED in accordance with the opinion. WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH Hrg May 2008 [3492354] [07-1453, 07-1524] (PAW)
12/19/2008	MANDATE ISSUED. [3500776] [07-1453, 07-1524] (CMD)
04/29/2009	SUPREME COURT order filed granting cert petition. Order filed on 04/20/2009. [3541922] [07-1453, 07-1524] (PAW)

SUPPLEMENTARY REPORT

Council Bluffs, Iowa

	Control No.: G77- R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-28-77 1300 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

At 1330 hours, July 26, 1977, Sergeant L. Williams, Detective L. Howlet and County Attorney Dave Richter reinterviewed Mr. J.H. (Jim) Burke of the Northwestern Bell Telephone Company. The interview was conducted at that location.

Information received during this interview was very similar to that received by Detective L. Brown. Mr. Burke stated that the subject he observed was very definitely wearing bib overalls as he observed the straps where they crossed in back. The subject was wearing a darker colored shirt garment under the straps of the overalls as they were visible. The subject was wearing some type of cap similar in de-

sign to a baseball cap. The subject was carrying a shotgun.

Mr. Burke stated later that same evening in a telephone conversation, that in his opinion the subject was dressed similar to a railroader.

Report Typed By: Nancy Geise	Date: 7-28-77
Time: 1345 hrs	Disposition of Case:
Approved By: _____	Sgt. L. Williams _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-28-77 1300 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

The following interview was conducted by Sergeant L. Williams, Detective L. Howlett and County Attorney Dave Richter.

On July 26, 1977 at 1446 hours David Charles Waide, age 21 years, DOB 7-16-56, 3510 North 9th Street, Carter Lake; employed by P.A.W.S. since January, 1977 was interviewed both at the P.A.W.S. Office, 2821 South 15th Street and in the Detective Bureau.

Interview was conducted concerning subjects observed walking dogs in the South section of town or mainly that neighborhood.

After discovering that Mr. Waide had in fact observed a subject on several occassions; he was asked to come to the Detective Bureau where he did positively identify a recent color photograph of GATES, CHARLES RICHARD, SS# 505-32-2631. Mr. Waide stated that his observations of Mr. Gates on several occassions were in the area of 23rd Avenue and 6th Street and also on several occassions in the area of 28th Avenue and the Indian Creek dike. On these occassions he observed Mr. Gates walking a dog or dogs. He stated he has observed Mr. Gates on at least one occassion walk a doberman; on one occassion a german shepherd, and he thought on one occassion a golden retriever. These observations were made during the evening hours and was last observed last Tuesday (July 19, 1977) near the 28th Avenue and Indian Creek Bridge walking one dog. Mr. Waide stated that he has observed Mr. Gates in various attire, but does not recall any particular attire other than his hat. Mr. Waide stated that he was wearing a hat that was described quite possibly as being the hat he was wearing in the photograph.

Report Typed By: Nancy Geise	Date: 7-28-77
Time: 1530 hrs	Disposition of Case:
Approved By: _____	/s/ _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN LLOYD
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 8-11-77 1241 hrs.	Evidence turned over to: Property Management Ident BCI

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

SYNOPSIS

This report will contain the details of an investigation into a background check on suspect, GATES, Charles Richard, DOB 5-5-30, 5'7", 178 lbs., brown hair, green eyes. Photos on file with CID taken prior to his interrogation by Detective Sergeant Dieatrick and Officers Mitchell, Chapin, Williams, etc.

PERSONS AND PLACES MENTIONED IN THIS REPORT

SUSPECT: GATES, Charles R.
Address: (driver's license Nebraska) 5120 South 21st Street, Omaha, Nebraska.
DOB: 5-5-30
Brown hair, green eyes, 5'7", 178 lbs.
SS# 505-32-6631

4105 South 11th – known address of above suspect during period of approximately July 1976 thru July 1977

2705 South 15th Street, Omaha, Nebraska – residence where suspect GATES, Charles R. vehicle is registered under corporate name Environmental Security Commission, known address of GATES, Charles R. prior to July 1966.

Detective Sergeant Charles Parker, Omaha Police Division

Detective Dennis Taylor, Omaha Police Division

DETAILS

Reporting officer with the intention of performing a complete background on suspect, GATES, Charles R. proceeded to the Omaha Police Department, Criminal Investigation Division and there spoke with Homicide Sergeant Charles Parker. Explaining to Sergeant Parker the progression of this investigation and mentioning suspect, GATES, Charles R. I learned that he, GATES, Charles R. is a suspect in a 1963 Omaha Police Division [Page 2] Homicide case which remains open. This case is Emily Geland homicide occuring 4-9-63. Detective Sergeant Parker called for two detectives familiar with the case, Detective Taylor, Dennis and his partner Detective Miller. I explained that suspect,

GATES, Charles R. had been given a polygraph examination by Confidential Polygraph Service, Omaha, Nebraska and it was the written opinion contained as an addendum to this report under heading "Test Results" that suspect GATES was not truthful in his denial of owning a shotgun or having shot John Schweer. I explained that I would like to do a neighborhood search for information about suspect, GATES, Charles R. in the area of 2705 South 15th, the address where his vehicle a 1961 Mercury Comet tudor handpainted black and white with a roof rack and Strongheart Brand Dog emblems on the door and a roof rack indicating it as some sort of police or security vehicle. The license number on this 1961 Mercury tudor comet is Nebraska 1-D6170. Detective Taylor asked if I were familiar with the Emily Geland homicide case and I replied that I had read the original offense and one or two supplements one of which implicated Mr. GATES, Charles R. I explained that I was familiar with the offense implicating Gates as a suspect in the Geland homicide as being Mrs. Charolett Taylor, 4330 Emmett Street, no PBX, employed at Ralph Printing, 19th and St. Mary's. I was familiar that this report was dated 4-10-63 and that Mrs. Taylor was then currently employed by Ralph Printing as was GATES, Charles R. In the report indications are made that GATES acted in a very suspicious manner while employed at the printing company and that his actions towards women indicated something of very unnatural form.

I also indicated to Detective Taylor that I would like to do a neighborhood search for information in the area of 5120 South 21st Street, Omaha, Nebraska for purposes of background investigation on GATES, Charles R.. This due to the fact that that address is contained on his currently valid Ne-

braska's Driver's License. Detective Taylor informed me that that neighborhood had already been done in reference to the Geland homicide with absolutely negative results and no one in the area knowing GATES, Charles R. or his actions. [page 3]

I accompanied Detective Taylor, Dennis to the area of 2705 South 15th Street. We found the house at that residence on the corner of 15th and Bancroft was listed for sale by Crown Realty, PBX 393-2121, Agent Russ Hansen, PBX 558-4338. Detective Taylor utilizing the OPD Computer facilities was able to learn that the residential property taxes on that particular property came back to Norbert Lenz, 3822 California, Omaha, Nebraska.

Upon arrival at the scene Detective Taylor and I approached the house and learned that there were no persons living within, no furniture, no drapes, and the house appeared as though it were undergoing a renovation. In checking next door, first house south, no address listed on the house we learned that the persons occupying that house had lived at 2705 South 15th but had not known GATES and had moved in immediately after his vacating the premises. We learned that there was little if any cleanup necessary by the new occupants upon moving in, the lady we spoke to was very hesitant to converse with Police Officers and did refuse to give her name at that time. She refused to give a reason for feeling this way. We then checked several other houses in the neighborhood and learned that persons knew that GATES lived there, not knowing his name, only knowing him by description and actions. Each resident related that GATES appeared to be a "spooky type individual". That he had three dogs which appeared as though they could have been extremely

mean. They said he walked the dogs constantly. They remarked about his manner of dress and his living habits, mentioning that he was strictly a loner and they never saw visitors in or around the household. GATES was never seen by any of the neighbors accompanying any other human, only his dogs. We spoke with Mr. and Mrs. Patrick Pope, 2634 South 15th, PBX 342-3480, who seemed to be very familiar with GATES and his actions. Mr. and Mrs. Pope in our interview related that GATES appeared to be a strange individual who loved animals, dressed in a strange fashion, and had acquired very strange living habits. We asked them to elaborate on this. They explained that GATES, never had company, would not answer the door for salesmen or any one traveling door-to-door for any purpose. That he drove a early 1960's Mercury comet which had a very strange paint job, being black on the fenders white on the doors and top with a roof rack [Page 4] and a set of top lights consisting of backup or turn signal type lights made for larger type trucks. The front doors of this vehicle had some sort of picture of a dog and the words "Iowa Environmental Security Commission". Mr. and Mrs. Pope related that they felt that GATES must have some sort of Company or job involving being a Security Guard or possibly being involved with the Armed Forces due to the fact that he continually work Army Khaki type clothing. They noted that in the winter time he wore a white hooded coat and always walked his dogs year round no matter what the weather. They related that GATES always chained the dogs to himself with chains or cloth webbing type leashes. Under questioning Mr. Pope related that he saw Mr. Gates at one time wearing a pistol type holester on a wide black belt around his waist. He was unable to determine whether or not the holester

contained a sidearm, because of the fact he thought the holester was of a flap type. Under questioning Mr. and Mrs. Pope related that they had never seen GATES, Charles R. with a shotgun. Mr. and Mrs. Pope were shown photographs taken by the Council Bluffs Police Department with a Polaroid SX70 camera illustrating GATES wearing a straw cowboy type Mexican hat with a chin type drawstring and without that hat from close up and distance. They related that this was indeed the man who had lived across the street from their residence at 2634 South 15th, Omaha, Nebraska.

Detective Taylor and reporting officer then proceeded to 3822 California and were later able to contact Norbert Lenz, owner of the residence at 2705 South 15th. Mr. Lenz is in a realty type business. His profession being, owning and renting houses throughout the City of Omaha. We learned that Mr. Lenz had been in business during the occupancy of Mr. Gates at the residence in question with his brother Larry Lenz. They have since dissolved the partnership although Larry Lenz could offer valuable information concerning Mr. Gates.

In interviewing Norbert Lenz, 3822 California, we learned that GATES, Charles R. had lived at the residence 2705 South 15th Street for approximately one year prior to July 1976. We learned that GATES had left the residence moving out owing Mr. Lenz approximately $400.00 in back rent. [Page 5]

Mr. Lenz related that Gates did considerable damage to the interior of the house by leaving the water running in the bathroom and kitchen. This caused the floorboards and subflooring to warp. Under question Mr. Norbert Lenz related that he felt that Gates may have done this out of anger, because

he had complained to Larry Lenz about the toilet running constantly and making noise. Under questioning LENZ, Norbert stated that there was considerable mess to clean up upon finding that GATES had moved. He related that he had been inside the house on at least two occasions while GATES resided there. Norbert Lenz related that after GATES moved out during the cleanup operation, a large wad of chewing gum was found by his son. He related this wad of chewing gum had definitely been used and was approximately twice the size of a softball. He made several comments about Mr. Gates being sort of a strange person, then explained that he had found a contraption made from an old refrigerator (round top type). This contraption contained a window which, as described by Mr. Lenz, took a lot of work to install in the door of this old refrigerator. Opening the door he found a small child type chair mounted to the bottom of the refrigerator. The three interior walls of the refrigerator were covered with intricately installed light sockets containing various colored light bulbs which were operational through a chord out the back of the refrigerator. He also stated atop the refrigerator was mounted an old type coffee pot which had been screwed to the top of the refrigerator. Mr. LENZ, Norbert related that "it looked like some sort of an outer space gadget". Under questioning we learned that the Lenz Brothers, while in partnership, required their tennants to fill out a thirty-day rental agreement form which they provided. This form required three references. Mr. LENZ, Norbert related that he thought that upon the dissolving of the partnership with his brother that those records were kept by Mr. Larry Lenz (office phone 554-1616, residential phone 556-9005).

Officers Taylor and Larsen then proceeded to Mr. Larry Lenz's office directly behind that of Mr. Norbert Lenz and spoke with the Secretary who attempted to locate this thirty-day rental agreement. She related that Norbert Lenz would probably have kept that agreement but that he was an atrocious records keeper. We returned to Norbert Lenz's office [Page 6] and he related that he would attempt to locate this paper and also related his attorney's name as he may have given it to his attorney during any legal action considered against GATES for the back rent owed. Mr. LENZ, Norbert then remembered that his son had mentioned finding a box of expended .38 caliber cases in the basement of 2705 South 15th upon cleanup. Mr. Lenz related that all of these items including the refrigerator, chewing gum, .38 caliber cases would have been destroyed by transporting them to the City Dump.

Officers terminated interview with Norbert Lenz and interviews with Larry Lenz and his Secretary and proceeded to Omaha Police Headquarters where additional computer work was done on GATES, Charles R., learning nothing new.

ADDITIONAL FOLLOW-UP NEEDED

In addition to questioning the above mentioned Lenz Brothers officers should attempt to find any other rental agreements filled out by GATES, at 2705 South 15th, 5120 South 21st Street, Omaha; 4105 South 11th Street, Council Bluffs through Randy Schmidt of the Council Bluffs Police Department or through his current address at #22 Grandview, Council Bluffs and the landlord there for obtaining any references given by Gates, Charles R. so

that these people may be questioned in reference to his activities.

Completion of this follow-up in detail will necessitate other supplementary reports into his mental history through Douglas County Hospital, The Lincoln Nebraska Regional Center and any other mental institutions which may come up in the future.

This follow-up investigation will also proceed into his employment over the past several years and any references given by Gates on employment applications to those employers.

Report Typed By: Nancy Geise	Date: 8-12-77
Time: 1500 hrs.	Disposition of Case:
Approved By: /s/ _____	D. C. Larsen _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 9:30 A.M.
Original Report by Officers: L. W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-25-77 1055 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

At 8:30 A.M. this date, while Officers Brown and Moore were with Lee Ault of the City Engineering Office plotting out the diagrams for this investigation, a Mr. J. H. (Jim) Burke of the Northwestern Bell Telephone Company approached us and related the following information.

Last Tuesday evening, July 19, 1977, at approximately 11:30 P.M., he and his son happened to be Northbound on South 11th Street in the area of the phone company. Mr. Burke at this time saw a man, average build, wearing bib overalls, running West along the cyclone fence on the South end of the

power company's lot. Then he went Northwest across South 11th Street under the yard light for the power company. Then he went due West along the South fence line for Best Refrigeration. This man also had a dog with him and Mr. Burke thought that it might have been an average size dog, possibly a hunting type. He felt it might have been a goldish color. That was the last he saw of him.

Mr. Burke advised that he thought the man was carrying a board, but then realized that it was a shotgun. Mr. Burke was stopped by another man in a red vehicle and was asked if he saw the man running. The man in the red vehicle then went in the direction where the man was running.

Officers went to the PAWS station and interviewed the employees there and according to two employees they have seen this man in the area before in the daytime but without the shotgun. They advised that they will watch for him and if they see anything matching this man's description they will call us. Officers then went and talked to an employee at the pumping station next to PAWS and advised them to be on the lookout for this unknown man.

Officers called Mr. Burke at his place of employment at 10:45 A.M. this date and asked him if the man in the red vehicle was driving a Toyota or a car. Mr. Burke advised that this was a red vehicle with no plates on it. He also advised that he saw a picture in the paper this morning and he did recognize John Schweer as the man he talked to that night.

J. H. (Jim) Burke, Installation Supervisor PBX & Repair Related, Northwestern Bell Telephone Company, 1101 - 31st Avenue, P.O. Box 219, Council

Bluffs, Iowa 51501, Phone (712) 328-4184. Home (712) 323-2657.

[EXHIBIT 4]

Report Typed By:	Date: 7-25-77
Time: 1055 hrs.	Disposition of Case:
Approved By: /s/	_____ L. W. Brown Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN LLOYD
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 8-12-77 1310 hrs.	Evidence turned over to: Property Management, Ident, BCI

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

SYNOPSIS

The following will be the contents of an interview with Mrs. Janet Shoemaker an astrologist who has volunteered her services to aid in the investigation into this offense. This report will contain numerous statements made by Mrs. Shoemaker in relationship to several astrological charts performed by her through her expertise in this subject.

PERSONS AND PLACES MENTIONED IN THIS REPORT

Mr. David E. Richter, Pottawattamie County Attorney

Mr. Joseph Hervol, Assistant Pottawattamie County Attorney

Reporting Officer (D. C. Larsen)

Mrs. Howard Shoemaker (Janet)

[EXHIBIT 5]

DETAILS

Mrs. Howard Shoemaker volunteered her services through the Pottawattamie County Attorney's Office to use her expertise in the field of Astrology to assist in the investigation into the above offense. Mrs. Shoemaker came to the County Attorney's Office at 0930 hours, August 12, 1977 and Mr. Joseph Hervol, Assistant Pottawattamie County Attorney requested reporting Officer be present to assist in taking notes on her comments on this case.

Mrs. Shoemaker requested that the date of birth of the victim, SCHWEER, John Lloyd. That date of birth is 7-16-20. She stated that when she first heard about this matter she paid very little attention to the details of this crime. She said that upon hearing of the $5,000.00 reward her interest was gained and she sat down reading the newspaper accounts and making up different charts about the crime itself and its astrological ramifications. Mrs. Shoemaker stated that the crime occurred during the Jupiter Hour. She said someone was being fooled by money. She said the watchman was to meet someone who

may have requested some help. She went on to relate that she felt that the watchman [page 2] was a person who would try to help anyone, but wanted to make sure that he helped that person down the right path in life. She said that he was the type of person who wanted to make sure that he could distinguish between right and wrong and attempted always to take the right path. She said that there was a female companion involved. She was then questioned concerning whose female companion. She related that she could not tell but that only that there was a female involved. She went on to say that the female was good at financing. She was artistic to the point of profitability. She was questioned then about what type of artisticness was involved. She related that the person would be good as an interior decorator or as a fashion designer, but not a lowly person such as a prostitute. She said that the man responsible for the crime is an outgoing person, that he is a job jumper. That he may have been involved in institutional work. She said that he was agressive with ideas. Then commented that even though he could come up with ideas that he wasn't the type of person to follow them through to the end, he would leave them to someone else to finish. She then said that a person involved in this crime is unusually proportioned either physically or psychologically. She went on to inform us that there was a salesman or an agent or some type of go between involved in a monetary transaction. She said that the female, mentioned earlier, was used to lure the victim. She stated that the victim trusted someone he shouldn't have. The victim was fooled by someone. She related that she got three main words from all of her astrological charts with reference to the crime itself. Those three words were: MONEY, GREED, and GAIN. She re-

lated that there was a threat to someone or someone's home involved in the motive for this crime. Then she went on to say that there is something buried under ground or within the confines of figures, such as a [illegible] account or a checking account or stocks or bonds, but something is hidden or buried. She was questioned about this and related that this could possibly be the fact that the victim is now buried.

Mrs. Shoemaker was then given the date of birth 5-5-30. This being the date of birth of GATES, Charles Richard, our suspect in this matter. She took a few minutes and made a short astrological chart concerning his personality. She found that he was (1) super-sensitive, (2) is a self- [page 3] disciplined person, (3) a very active person, both mentally and physically, (4) was over-consumed with everything he came in contact with or he would reject it completely. That he may be very over-consumed with illegal sex. (5) His father was far to authoritative, (6) he has some sort of argument with authority, he may hate authority.

She went on to check another of her astrological charts saying that there was a windfall of money involved behind the motive or the actions leading to this crime. She said that the victim was going to help somebody. She said that there was some sort of a bondage concerning money or something that would fit the definition of the word bondage and that she would work it out and contact the Pottawattamie County Attorney's Office with another chart.

This concluded the interview with Mrs. Howard Shoemaker. She stated that she would work on some more charts of astrological nature and contact the

Pottawattamie County Attorney's Office with the results.

ADDITIONAL FOLLOW-UP NEEDED

These thoughts concerning the astrological charts made by Mrs. Howard Shoemaker should be compared with possible suspects, possible motives, and the numerous theories involved with this offense, then filed for future reference.

Report Typed By: Nancy Geise	Date: 8-13-77
Time: 1400 hrs	Disposition of Case:
Approved By: /s/_____	D. C. Larsen_____ _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930
Original Report by Officers: L. W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-22-77 1820 hrs	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Note turned over to Det. Brown by Sgt. Larry Williams at 10:52 A.M. at the scene:

12:30 A.M. 7-20-77

Dave:

If you get a chance, talk to Tim O'Niel at Datsun Mt. Ask him if he would install or put in flood lights in the car lot on the West side of his building, where he keeps his trucks parked. I chased a man out of there last night. It appeared that he was trying to get in to one of the trucks. When I approached him

he ran north West in to the weeds and I lost him. Lights would sure help in this area.

Schweer.

Note tagged and in evidence.

[EXHIBIT 6]

Report Typed By:	Date: 7-22-77
Time: 1820 hrs	Disposition of Case:
Approved By: _____	_____ L. W. Brown _____ Signature Reporting Officers

[EXHIBIT 6]

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): John L. Schweer
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-22-77 5:25 P.M.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Officers Mitchell and Kremer were assigned to work with C.I.D. on above offense. Officers worked Sat. evening 7-23-77. Officers went to several taverns looking for contacts and people that we thought could help us in this investigation. Officers did make contact with numerous people and put the word out what we had to offer and what we wanted in return.

Officers worked Sunday 7-24-77 and again we tried to make more contacts towards the above offense. Officers did contact Kenneth Still in reguards to this offense. Ken was talked to about this and also he was offered money if he could come up with some-

thing later on. Ken stated he would try and he would be contacted later if anything came up.

Officers R.Moore and Kremer worked Monday 7-25-77 together. Officers assisted in the questioning of Charles Gates at the station and later we checked his residence to see if we could find out anything else about this person in reguards to this offense. After checking this residence, #22 Grandview Ave. officers made several other contacts this evening putting out information money.

Officers Mitchell and Kremer worked Tuesday 7-26-77. Some of the contacts started to make contact back to us. So far no new leads though. Officers again tried to contact Charles Browning again but he wouldn't talk to officers or he hid out for some other reason. (Charles Browning was talked to by officers Moore and Kremer on 7-25-77 10.00 P.M. At this time Chuck stated to officers that he went to the drive in Thursday night 7-21-77 and he returned home around 3:00 A.M. He stated that he went with the girl Peggy that he lives with. He stated that on Friday 7-22-77 he and Peggy went to Sioux City for a couple of days, returning Sunday night 7-24-77. charles was also offered information money and he stated he would contact officers later or officers could contact him. Charles stated that Peggy did have a 12 gauge shotgun and he uses it. Officers did leave charles at that time and are checking out his story.) Officers checked out the people that we had working for us and at this time there are no new leads. Officers Mitchell, L.Brown, Moore, and Kremer then worked the area where John Schweer was shot. Officers had a night scope and officers were atop the telephone building and checking the area for a man

with a dog. Officers did stay in that area until 4:00 A.M. with this night scope.

Officers feel that there contacts are out working and it will take time to get information back. Above report is left to cover some of the things done about above offense.

[EXHIBIT 7]

Report Typed By: Kremer	Date: 7-27-77
Time: 6:00 P.M.	Disposition of Case: open
Approved By: /s/ _____	B. J. Kremer _____ _____ Signature Reporting Officers

[EXHIBIT 7]

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: Homicide	Date and Time Reported: 7-22-77, 9;30 A.M.
Original Report by Officers: L.W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-23-77 0500 hours	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Between the hours of 3 and 4 am, 7-21-77, officer Cady had occasion to speak to Mr. John Schweer, who at the time was working as a security guard at McIntyre Olds and Tim O'Neil Datsun. During this conversation, Mr. Schweer mentioned that he had observed a man in the area of Tim O'Neil Datsun and that he thought the man was carrying a rifle, but he could have been mistaken and that the object that the man was carrying could have been a car jack. Mr. Schweer had then lost sight of the man and he stated that he believed that the man was still in the area and that he was probably hiding in the

weeds located near the Datsun dealership. Schweer stated that a dog was still in the area and that he believed that this animal belonged to the man that he had seen. At the time of this conversation, I did not think too much of the incident related to me and Mr. Schweer did not seem too concerned. I am unable to recall and further details of the conversation at this time.

[EXHIBIT 8]

Report Typed By: Cady	Date: 7-23-77
Time: 0530	Disposition of Case:
Approved By: /s/_____	/s/_____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa
Page #1 of 3

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0732 Hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John
Address:	Address: 212 Millard, Co. Bluffs, Ia.
Date and time of this supplementary report: 7-28-77 1700 Hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

[EXHIBIT 10]

Sgt. L.L. Diamond accompanied by Mr. Joe Hrvol of the Counties Atty's Office did make the following contacts while involved in the above investigation. The area covered was So. 13th Street from 26th Avenue to and including the 2900 block.

1225 26th Avenue, Mrs. Annabelle Wills – No Information

1230 26th Avenue, Mr. Messick – Referred to the Vurmule residence on So. 15th St. in approx. the 2700 block.

2613 So. 13th Street. Delores Marr – No Information

2620 So. 13th Street. Byron Jones – No Information

816 24th Avenue. Dennis Larsen – No Information

2612 So. 13th Street. Mrs. Michael Shea – Stated that she observed a male subject that fit the description of the suspect in question in the area from the So. Expressway to the levee and from 23rd Ave. to the Interstate and this subject was walking with dogs, one of which was a brownish color. She also feels that this subject boards his dogs at the Kirth Kennels on 23rd Ave. in the 600 block. She further states that she has observed this man wearing bib overhalls, some type of hat and as stated above, always in the company of dogs. (Officers note: This is a perfect description of Charles Gates, a previous suspect in the above case.)

625 So. 13th Street. Mrs. Daniel Akins – This ladies story concurs exactly with the information given to officer by the above Mrs. Shea. The only added information is that Mrs. Akins did observe the above subject as recently as Friday the 22nd of July in the area of the 600 block of 23rd Avenue and the Expressway and the CreekTop.

1200 Block of 27th Avenue. - Mr. Katerite – Relates partial information to concur with the above two ladies. [page 2]

(Cont.)

2701 So. 13th Street. – Alvin Gerdis – Mr. Gerdis states that he is employed at Mercy Hospital in the Power Plant. He relates that there is a young man that works in the laundry at the above hospital and lives in BO'S Trailer Court which is located in the 2800 block of So. 6th Street. Mr. Gerdis stated that this mans name is Fred (Last name unknown) and he is approx. 25 years old and does have a German Shorthair dog which he walks around with. (Note: Detective Car #521 was supposed to contact this Fred ???? if possible and converse with him.)

2727 So. 13th Street. Joe Benak – No Information.

2721 So. 13th Street. Lester Bingle – This man and his wife didn't seem to have any useful information, However it might be noted that this man does fit the general description of the wanted suspect very closely. It was also learned that this man does walk a brown dog in this area, however officer could not observe the dog anywhere to see if it fit the description of the listed suspect dog and when questions were asked about the dog, the above only stated that his was a little dog. This man did appear to be in his early 60's but did manage himself very well for his age.

2716 So. 13th Street. Lyle Hinkle – This gentleman stated that he had seen a 15 or 16 year old boy with a brown dog going up and down the levee in the A.M. hours around the above area.

2712 So. 13th Street. Robert Hopkins – No Information.

2704 So. 13th Street. Mrs. Hardyman – No Information.

2705 So. 13th Street. Mr.&Mrs. Gerald Sweeney – According to these people, they had seen a subject fitting the description of the suspect in the area with a brown sheperd looking dog. It seems that this man come from north of 27th Avenue and watched a house being built next door to the above people and then would return again to the north to an unknown location.

_1_ 28th Avenue. Merle Brown – Burt Thomas – According to these two gentleman, they have observed a young man jogging in the above area (Cont.) [page 3] (Cont.) and while observing this young man, they also observed that he was running with a large brown dog. This subject appeared to be approx. 25 years of age and has been seen numerous times in the above vicinity jogging with this dog.

2700 block of So. 15th Street – Buster Vermule – While conversing with this subject, his granddaughter did relate that she had seen a man with a large brown dog in the area of So. 15th Street and 23rd Avenue just prior to the ending of the school year.

Officers Note: It might be noted that while speaking with the Vermule family this date, Mrs. Vermule stated that her son had been by the Zaiger residence sometime ago and after coming home did relate to his mother that he had never seen so many C.B. Radio's as he had just seen at the Zaigers on So. 15th Street. The point of leaving this information is that the Zaigers are very capable of harming someone, and the idea of doing so in order to commit larceny does not fall beyond them. This name should not be over-looked in the Schweer shooting investigation.

[EXHIBIT 10]

Report Typed By: Sgt. L.L. Diamond	Date: 7-28-77
Time: 1830 Hrs.	Disposition of Case: Open
Approved By: /s/	Sgt. L.L. Diamond & Mr. Joe Hrvol (Co. Atty's Office) Signature Reporting Officers

STATE OF IOWA, POTTAWATTAMIE COUNTY,
IN THE DISTRICT COURT OF IOWA
POTTAWATTAMIE COUNTY

PRELIMINARY INFORMATION

STATE OF IOWA	)	
	)	
vs.	)	SS.
	)	
Curtis McGhee	)	

The above named defendant is hereby accused of the crime of MURDER.

For that the defendant, on or about the 22nd day of July, 1977 in Pottawattamie County, Iowa, did murder John Schweer, contrary to the statue in such cases made and provided by Section 690.1, 1977 Code of Iowa

Wherefore he prays that the said defendant Curtis McGhee may be arrested and dealt with according to law.

Lyle W. Brown

Subscribed and sworn to by the said Lyle W. Brown before me, this 17 day of November, 1977.

/s/
Magistrate

**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF IOWA, CENTRAL DIVISION**

TERRY HARRINGTON, individually and in his capacity as the father of NICOLE ANTOINETTE HARRINGTON, Plaintiff,	)	Civil Nos. 4-05-CV-00178-RP-TJS 05-CV-00255 03-CV-90616
vs.	)	
COUNTY OF POTTAWATTAMIE, IOWA, CITY OF COUNCIL BLUFFS, IOWA, DAVID RICHTER, in his individual and official capacities, JOSEPH HRVOL, in his individual and official capacities, DANIEL C. LARSEN, in his individual and official capacities, LYLE W. BROWN, in his individual and official capacities, and JOHN DOES ONE THROUGH NINE, in their individual and official capacities, Defendants.	)	**PLAINTIFF TERRY HARRINGTON'S STATEMENT OF ADDITIONAL MATERIAL FACTS THAT PRECLUDE SUMMARY JUDGMENT**

Comes now Plaintiff Terry Harrington ("Harrington"), by and through counsel, and pursuant to Federal Rules of Civil Procedure Rule 56 and Local Rule 56.1(b)(3) submits his Statement of Additional Material Facts that Preclude Summary Judgment and that defeat Defendants' Motion for Partial Judgment on the Pleadings1 (despite Defendants' failures to meet their requisite burdens for such motions) as follows:

1. Defendants Brown and Larsen were detectives with the Council Bluffs Police Department at the time of the Schweer murder and worked as the lead investigators working on the case from July 22, 1977 through the criminal trails of Harrington and McGhee in 1978. (PCR 2000 Tr. (Brown Test.) at 64-65, Pl.'s App. at 247-248; Compl. ¶¶ 11, 12).

2. Defendants (then) County Attorney Richter and Assistant County Attorney Hrvol worked closely with Brown, Larsen, and the rest of the Council Bluffs Police Department during the Schweer murder investigation, including participating in witness interviews before any arrests were made. (Hrvol Dep. 1987 at 5-7, Pl.'s App. at 159-161; Gershman Aff. ¶¶ 11, 14, Pl.'s App. at 328-333; Compl. ¶¶ 9, 10).

---

1 Council Bluffs and Defendants Larsen and Brown have relied in part upon the summary judgment motions filed by Pottawattamie County and Defendants Hrvol and Richter. As such, Plaintiff hereby submits the following facts as necessary to address those issues that this Court may convert to a summary judgment analysis. All claims not converted shall be responded to with the pleadings, which Defendants admit are taken as true for the purposes of analyzing a motion for judgment on the pleadings under Federal Rules of Civil Procedure Rule 12(c).

3. Neither the Pottawattamie County Attorney's Office, through its chief law enforcement officer County Attorney Richter, nor the City of Pottawattamie Police Department trained regarding constitutional rights established by *Brady v. Maryland* and *Giglio v. United States*. (Richter Dep. 2006 at 6, 96, Pl.'s App. at 335, 336; Hrvol Dep. 2006 at 219-224, Pl.'s App. at 339-340; Gershman Aff. ¶¶ 10, 15, 17, Pl.'s App. at 328-333; Nault Aff. ¶¶ 4-20, Pl.'s App. at 323-327; *see also* Wilber Dep. at 8, 31, Pl.'s App. at 314, 315).

4. In 1977, Defendant Hrvol worked closely with police officers Larsen and Brown over the weeks leading up to the arrests of Plaintiffs Terry Harrington and Curtis McGhee. (Hrvol Dep. 1987 at 5:4 – 6:5, Pl.'s App. at 159-160; Larsen Dep. 1987 at 8:16 – 8:22, Pl.'s App. at 180; PCR 2000 Tr. (Hrvol Test.) at 295:25 – 296:11, Pl.'s App. at 274-275; Gershman Aff. ¶ 12, Pl.'s App. at 330-331; Compl. ¶¶ 24, 26).

5. Hrvol helped do a lot of "stuff" because the police field investigators needed help with the investigation and put a lot of man-hours into the investigation. (Hrvol Dep. 2000 at 17:4 - 17:14, Pl.'s App. at 241; Trial Tr. at 1033, Pl.'s App. at 157).

6. Hrvol canvassed the neighborhood near the scene of the murder with Officer Diamond. (Police Rep. dated July 28, 1977, Pl.'s App. at 036-038; Compl. ¶ 46).

7. At that time, Hrvol was not assigned the responsibility of prosecuting the case—he was assisting the police in the investigation: "The only

one in the office intensely involved in the investigation was me." (Hrvol Dep. 1987 at 5:4 - 6:5, Pl.'s App. at 159-160; PCR 1988 Tr. (Hrvol Test.) at 47:23 – 47:25, 67:24 – 67:25, Pl.'s App. at 220, 229).

8. The early stages of the investigation involved more than a dozen suspects, none of whom included Harrington or McGhee. (PCR 2000 Tr. (Brown Test.) at 69, Pl.'s App. at 252; Richter Dep. 1987 at 39:19 – 40:5, Pl.'s App. at 169-170; Trial Tr. 83, 98-102, 104-110, 134, 492-493, Pl.'s App. at 096, 098-102, 103-109, 133, 144-145; Withheld Police Reps., Pl.'s App. at 021-038).

9. While working on the investigation of the case, and before Harrington was a suspect, Hrvol knew Charles Gates was a suspect in the Schweer murder. (PCR 2000 Tr. (Brown Test.) at 75:18 – 76:17, Pl.'s App. at 255-256; Hrvol Dep. 2000 at 9:3 – 9:21, Pl.'s App. at 240; Hrvol Dep. 2006 at 94:5 – 94:22, Pl.'s App. at 338).

10. Hrvol assisted in answering McGhee's discovery2, which disavowed any other suspects in the case other than McGhee (including even Harrington). (Def's Answer McGhee Interrog. No. 2, Pl.'s App. at 190; Compl. ¶ 213).

11. Hrvol assisted in answering McGhee's 1987 first post-conviction hearing discovery, which asked information about "witnesses used at trial who

---

2 Plaintiff references discovery from McGhee's case and post-conviction review because after due diligence, none of Plaintiff's previous or current attorneys could locate copies of Harrington's early discovery.

were promised leniency in exchange for their testimony against Curtis McGhee, and the specific promises made to each" but answered: "None." (Def's Answer McGhee Interrog. No. 6, Pl.'s App. at 192; Compl. ¶ 246).

12. Hrvol assisted in answering McGhee's 1987 first post-conviction hearing discovery, which as a result of the report of a man and a dog seen in the vicinity of the murder scene, that the "man and a dog" (Gates) was "never found or identified." (Def's Answer McGhee Interrog. No. 14, Pl.'s App. at 195; Compl. ¶ 214).

13. Hrvol was present with the police investigators a number of times when Hughes was interviewed, both in Omaha and Council Bluffs, before charges were filed against Harrington. (Trial Tr. at 71-73, 112-113 Pl.'s App. at 093-095, 111-112; Hrvol Dep. 1987 at 6:6 – 6:15, 21:6 – 21:12, Pl.'s App. at 160, 165; PCR 1988 Tr. (Brown Test.) at 14-15, Pl.'s App. at 213-214).

14. The investigation was particularly long lasting, and as such, Hrvol was sure prosecutors got copies of the police reports. (Hrvol Dep. 2000 at 9, Pl.'s App. at 240).

15. Hrvol, Brown, and Larsen went to Omaha to interview Hughes. (Larsen Dep. 1987 at 8:16 – 8:22, Pl.'s App. at 180; Oct. 15, 1977 Omaha Police Rep., Pl.'s App. at 062-065).

16. Richter oversaw the prosecutor office's participation in the investigation of the Schweer murder, and Hrvol kept him advised. (Richter Dep.

1987 at 12:4 – 12:9, Pl.'s App. at 167; PCR 1988 Tr. (Hrvol Test.) at 67:25 – 68:4, Pl.'s App. at 229-230).

17. His office participated to a significant extent in the investigation and would have received regular reports and would have generally monitored what was going on. (Richter Dep. 2006 at 93-96, Pl.'s App. at 336).

18. Richter interviewed a witness closely after the murder, David Waide, who positively identified Gates as the man he had seen walking dogs in the vicinity of the murder based on a photograph he was shown by police and Richter. (Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 022; Compl. ¶¶ 44, 204).

19. Richter and Hrvol, on August 12, 1977, in conjunction with the police, and before Harrington was a suspect, consulted an astrologer early in the investigation and gave her Gates' date of birth so she could prepare astrological charts for him. (Withheld Police Rep. dated Aug. 13, 1977, Pl.'s App. at 030-031; Compl. ¶¶ 55, 206).

20. Hrvol was not only aware of every occasion the police talked to Kevin Hughes, but Hrvol was actually with the police on practically every occasion. (Larsen Dep. 1987 at 10:7 – 10:16, Pl.'s App. at 182).

21. Larsen caught Hughes in several lies, so Hughes was told that he had "better cough up the truth because it wasn't going to look good for Hughes if he didn't." (*Id.* at 15:4 – 15:6, Pl.'s App. at 183).

22. One investigative tool included telling a "smaller fish" that he would be the "trigger man" unless he yielded up bigger fish. (*Id.* at 15:7 – 15:13, Pl.'s App. at 183).

23. Once that threat was made to Hughes, he became much more cooperative. (*Id.* at 15:24-25, 16:1, Pl.'s App. at 183-184).

24. Neither the fact that Hughes had been threatened, nor the fact that he was testifying in return for criminal charges being dropped, was ever provided to Harrington or his lawyers prior to Harrington's conviction (or to McGhee's lawyers). (PCR 1988 Tr. (Richter Test.) at 30-31, Pl.'s App. at 216-217; (Hrvol Test.) at 51, Pl.'s App. at 222; Compl. ¶ 248).

25. There were no suspects as hot as Gates, known as the man with the dog, the first four or five days following the murder. (PCR 2000 Tr. (Brown Test.) at 66:1 – 69:24, Pl.'s App. at 249-252; Nault Aff. ¶¶ 21, 22, Pl.'s App. at 323-327; Compl. ¶ 40).

26. During the first week after the murder there were a number of suspects. (PCR 2000 Tr. (Brown Test.) at 67:8 – 67:9, Pl.'s App. at 250).

27. Brown knew as the lead investigator that early on, witness Burke saw a person with a dog and a shotgun around the time of the murder, whom he assumed to be Gates. (*Id.* at 66:10 – 67:3; Pl.'s App. at 249-250; Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 21; Compl. ¶¶ 35, 36; Nault Aff. ¶ 21, 23, Pl.'s App. at 323-327; Burke Aff. 2002, Pl.'s

App. at 279-280; Burke Interview 2003, Pl.'s App. at 289-295).

28. Brown knew that Schweer left a note about chasing someone off that had a gun. He assumed that the person Schweer was writing about before his death was Gates. (PCR 2000 Tr. (Brown Test.) at 73:5 – 73:12, Pl.'s App. at 253; Withheld Police Rep. dated July 23, 1977, Pl.'s App. at 35; Nault Aff. ¶¶ 22, 23, Pl.'s App. at 323-327; Compl. ¶ 29).

29. Brown testified at Harrington's 1978 trial and 1988 post-conviction review proceedings that there were no early-on alternate suspects and he failed to indicate that Gates was ever a suspect, but in Harrington's 2000 post-conviction review proceedings testified that Gates was a suspect within a couple of days of the murder. (PCR 2000 Tr. (Brown Test.) at 65:17 – 66:15, Pl.'s App. at 248-249; Compl. ¶ 211; Nault Aff. ¶ 23, Pl.'s App. at 323-327).

30. Council Bluffs police officer, Larry Williams testified that Hrvol and Richter worked side by side on the investigation and that all police reports, including polygraphs were provided to the Pottawattamie County Attorney's office. (PCR 2000 Tr. (Williams Test.) at 30:7 – 30:12, 63:16 – 64:2, Pl.'s App. at 244, 246-247).

31. Hrvol and Richter worked side by side with Williams on the Schweer murder investigation. (PCR 2000 Tr. (Williams Test.) at 59:7 – 59:12, Pl.'s App. at 244, 245; Williams Dep. 2005 at 48:20 – 49:1, Pl.'s App. at 317-318).

32. Richter, along with Williams, reinterviewed witness Burke after Brown had interviewed him. (Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 021; Compl. ¶ 37; Nault Aff. ¶ 23, Pl.'s App. at 323-327).

33. Police procedure required that all police reports from the Schweer homicide investigation were given to the county attorney's office, but eight reports never made it to Harrington's (or McGhee's) defense counsel or post-conviction review counsel. (PCR 2000 Tr. (Williams Test.) at 63:16 – 64:2, (Brown Test.) at 75:14 – 75:21; (Cleary Test) at 203:22 – 204:24, 215:11 – 215:20, Pl.'s App. at 246-247, 255, 257-259; Compl. ¶¶ 279-281).

34. The procedure also required that all polygraph results accompany those investigative reports. (PCR 2000 Tr. (Williams Test.) 63:16 – 64:2, Pl.'s App. at 246-247).

35. Richter and Hrvol, and the police, were aware that—before implicating Harrington as Schweer's murderer—Hughes had incorrectly implicated other people, including Anthony Houston, Arnold Kelley, and Steven Frasier, one-by-one, as being responsible for Schweer's murder. (Richter Dep. 1987 at 39:19 – 40:5, Pl.'s App. at 169-170; Trial Tr. 43, 83, 98-99, 134, 97-98, 100-102, 104-110, 492-493 (Hughes Test.), Pl.'s App. at 92, 96, 98-99, 133, 97-98, 100-102, 103-109, 144-145).

36. Richter stated that he could not muster the probable cause to issue an arrest warrant for Hughes for Schweer's murder, and Hrvol opined that Hughes was not an accessory or principal to the

murder. (Richter 1987 Dep. at 38:13 – 39:6, 40:14 – 40:16, Pl.'s App. at 168-169, 170; PRC 1988 Tr. (Hrvol Test.) at 64-65, Pl.'s App. at 247-248).

37. Hughes initially lied about Anthony Houston committing the murder while Hrvol was present and before Harrington was a suspect. (Trial Tr. 97-102, Pl.'s App. at 97-102; Compl. ¶ 96).

38. Larsen knew that Hughes had falsely implicated Houston and Dennis Jackson before implicating Harrington. (Larsen Dep. 1987 at 9:4 – 9:24, Pl.'s App. at 181; Trial Tr. at 104-109, Pl.'s App. at 103-108).

39. Hughes lied under oath at Harrington's trial that he was with McGhee and Harrington at the car dealership the night of the murder. (PCR 2000 Tr. (Hughes Test.) at 251:3 - 251:11, Pl.'s App. at 260).

40. Hughes lied that he had seen Harrington with a shotgun. (*Id.* at 254:8 – 254:18, Pl.'s App. at 261; Trial Tr. at 127-130, Pl.'s App. at 126-129).

41. Hughes had no personal knowledge regarding Schweer's death—the only knowledge he received came from police and prosecutors. (Hughes Aff. at ¶¶ 2 & 13, Pl.'s App. at 308-309).

42. Hughes met with police and prosecutors on four or five occasions and was taken to the scene of the crime, and the police and prosecutors provided him with the details of his testimony so he could keep his story straight. (Trial Tr. at 115-137, Pl.'s App. at 114-136; PCR 2000 Tr. (Hughes Test.) at 251,

Pl.'s App. at 260; Hughes Dep. 2003 at 7, Pl.'s App. at 311; Compl. ¶¶ 135, 136).

43. The day before Hughes gave his November 16, 1977 statement that implicated Harrington in Schweer's murder, Hughes went to the murder scene with representatives of the County Attorney's office. (Trial Tr. at 138, Pl.'s App. at 137; Compl. ¶ 134).

44. In return for his false testimony, Hughes was told he might receive the $5,000.00 reward; Hughes was offered this money by Hrvol. (PCR 2000 Tr. (Hughes Test.) at 251:3 – 251:15, 256:20 – 257:21, Pl.'s App. at 260, 263-264; Hughes Aff. 2003 at ¶ 3, Pl.'s App. at 308; Compl. ¶¶ 78, 80).

45. In return for his false testimony, Hughes was told that he was not going to be charged for the murder. (PCR 1988 Tr. (Hrvol Test.) at 74:16 – 75:21, Pl.'s App. at 232-233).

46. Hughes testified that he lied because he did not want to be part of a murder "rap" and police and prosecutors threatened with murder charges. (Trial Tr. at 115, Pl.'s App. at 114; PCR 2000 Tr. (Hughes Test.) at 251, 256-257, Pl.'s App. 263-264; Hughes Aff. 2003 at ¶ 3, Pl.'s App. at 308).

47. The State failed to disclose the 1978 charge filed against Hughes for conspiracy to commit auto theft—the attempted auto theft in which the State claimed Harrington shot Schweer. (PCR 1988 Tr. (Richter Test.) at 30, 46, Pl.'s App. at 216, 219; Compl. ¶ 248).

48. Hughes was first charged on June 9, 1978, as an adult for both escape from the Christian Home and conspiracy with McGhee and/or Harrington. (Richter Dep. 1987 at 19:1 – 19:21, Pl.'s App. at 172; PCR 1988 Tr. (Brown Test.) at 11:21 – 13:21, Pl.'s App. at 210-212; Compl. ¶ 249).

49. Brown and/or Hrvol filed the preliminary information and oath charging Hughes with escape and conspiracy to commit auto theft with the Clerk of the District Court on July 7, 1978. (Richter Dep. 1987 at 18-19, Pl.'s App. at 171-172; Hrvol Dep. 1987 at 11:2 – 11:18, Pl.'s App. at 163; Compl. ¶ 250; PCR 1988 Tr. (Brown Test.) at 11-13, Pl.'s App. at 210-212).

50. Hrvol instead filed a Juvenile Petition for Hughes, Number 11-0196, with the Clerk of the District Court on July 17, 1978 in order to change the adult conspiracy to commit auto theft to a juvenile charge, which Richter was aware of. (Richter Dep. 1987 at 20:15 – 21:18, Pl.'s App. at 173-174; Compl. ¶ 251).

51. Hrvol moved to dismiss the juvenile conspiracy to commit auto theft petition against Hughes, which the Clerk of the District Court filed on November 6, 1978. (PCR 1988 Tr. (Hrvol Test.) at 55:2 – 55:8, Pl.'s App. at 224; Compl. ¶ 252).

52. As a policy, Richter had some review over determinations to charge nonroutine juvenile cases. (Richter Dep. 1987 at 21:14 – 21:21, Pl.'s App. at 174; Compl. ¶ 253).

53. Richter did not dispute that the record reflected that he interviewed Hughes regarding the Schweer murder. (Richter Dep. 1987 at 12:7 - 12:22, Pl.'s App. at 167; Hughes Nov. 16, 1977 Statement, Pl.'s App. at 66).

54. Richter and Hrvol never disclosed the deals that they made with Hughes. (PCR 1988 Tr. (Brown Test.) at 14; (Richter Test.) at 30-31, 46; (Hrvol Test.) at 51, Pl.'s App. at 213, 216-217, 219, 222; Compl. ¶¶ 248-254).

55. On November 16, 1977, an information charging Harrington with first-degree murder for Schweer's death and Richter and Hrvol approved the decision to arrest Harrington. (True Information, Cause No. 17892, Pl.'s App. at 39-61; Compl. ¶ 195).

56. Richter and Hrvol talked to Hughes before Hughes's statement and 1978 trial testimony and told Hughes that Harrington claimed he was at Peony Park at a concert at the time of the murder and that Harrington could not have been with Hughes at 11:00 o'clock and that time is a factor in this case. (Trial Tr. at 117-118, 152, Pl.'s App. at 116-117; Compl. ¶ 137).

57. Hughes testified that he decided to expose his earlier lies because "[i]t's just been on my mind. I just want to get the truth out." (PCR 2000 Tr. (Hughes Test.) at 254:22 – 254:25, Pl.'s App. at 261).

58. Harrington's alibi witnesses that in 1978 corroborated Hughes' story have recanted their testimony. (Jacobs Aff., Pl.'s App. at 296-305; Pride

Aff., Pl.'s App. at 306-307; Jones Aff., Pl.'s App. at 281-282).

59. Clyde Jacobs' trial testimony was false; he did not see Harrington or Hughes on the night of Schweer's murder, and he never saw Harrington with a shotgun in his car. (PCR 2000 Tr. (Jacobs Test.) at 272, 276:2 -276:6; Pl.'s App. at 265, 269).

60. At the time of Harrington's trial, Jacobs was forced to testify falsely by the prosecutors and police. (*Id.* at 272:15 – 273:25, Pl.'s App. at 265-266).

61. Hrvol accompanied the police on trips to Omaha and Council Bluffs to investigate, including trips with Larsen and Brown to take Jacobs from Omaha to Council Bluffs for questioning along with Jones and Pride. (Hrvol Dep. 1987 at 21:6 – 21:12, Pl.'s App. at 165; Compl. ¶¶ 156, 163).

62. The police originally detained Jacobs and Roderick Jones. Over time, the police gave them the details of the murder. (PCR 2000 Tr. (Jacobs Test.) at 273-274, Pl.'s App. at 266-267).

63. The police told Jacobs and Jones that if they did not testify against Harrington and McGhee, they would be charged with the same charges, plus the stolen cars charges. (PCR 2000 Tr. (Jacobs Test.) at 273-274, Pl.'s App. at 266-267).

64. The police also detained Hughes' girlfriend, Candace Pride. The police pressure caused Pride to break down where she nearly fainted. All of the Omaha teenagers, Jacobs, Jones and Pride were told that if they did not testify as the police were tell-

ing them to, they would all go to jail. (*Id.* at 274:2 – 274:21, Pl.'s App. at 267).

65. The three teenagers were contacted several times a week for about one month during the investigation of the case. (*Id.* at 279:18 – 282:7, Pl.'s App. at 270-273).

66. Hrvol, Brown, and Larsen confronted Harrington's alibi witness Thea Scott and accused her of lying, informed her incorrectly about the results of her polygraph examination, and Hrvol threatened her. (Trial Tr. at 143-144, 606-615, Pl.'s App. at 142-143, 146-155; Compl. ¶¶ 143, 144).

67. Hrvol told State witness Pierce to lie about McGhee's confession, and arranged, in conjunction with Larsen, for Pierce to be placed in a cell next to McGhee to effectuate this. (Pierce 1988 Test. at 16-27, Pl.'s App. at 197-208; Compl. ¶ 227).

68. McGhee never admitted to the murder while in prison. (Pierce 1988 Test. at 23:14 – 24:1, Pl.'s App. at 204-205; Reese Aff., Pl.'s App. at 090).

69. Hrvol told Pierce that if he obtained information from McGhee, things would go better for Pierce regarding his criminal charges. (Pierce 1988 Test. at 23:14 – 24:1, Pl.'s App. at 204-205).

70. Hrvol said in return for testimony, Pierce's criminal charges would be dismissed. (*Id.* at 20:1 – 20:5, Pl.'s App. at 201).

71. Hrvol met with Pierce several times in the designated client-lawyer room in the jailhouse without the presence of Pierce's lawyer and told

Pierce what to say. (*Id.* at 25:16-26:3, Pl.'s App. at 206).

72. After testifying for the state, the auto theft charges were dropped. (*Id.* at 24:10 – 24:20, Pl.'s App. at 205).

73. All of Pierce's trial statements were false. (*Id.* at 24:10 – 24:20, Pl.'s App. at 205).

74. In 1988, Pierce testified under oath and subject to penalty of perjury that police and prosecutors suggested some of the things that he should say in his 1978 McGhee trial testimony and that he lied in exchange for the promises of leniency. (*Id.* at 16-27, Pl.'s App. at 197-208; Compl. ¶¶ 228, 232).

75. Larsen described how he would go to North Omaha with other detectives in unmarked cars and single out "ghetto dwellers" and say, "'Bro, come here. Did you get the information I wanted,' and just kind of have some fun with them." (Larsen Dep. 1987 at 19:18 – 21:3, Pl.'s App. at 185-187).

76. Withheld evidence of a 911 tape in another case was found in Hrvol's desk after he had left the County Attorney's Office. (PCR 2000 Tr. (Hrvol Test.) at 297:23 – 299:10, Pl.'s App. at 276-278).

77. Plaintiff hereby incorporates all findings of fact made by the Iowa Supreme Court in its decision, *Harringon v. State*, 659 N.W.2d 509 (Iowa 2003), which vacated his conviction. (Pl.'s App. at 003-020).

Respectfully Submitted this 27th day of October, 2006.

/s/

Gerry L. Spence
J. Douglas McCalla
Mel C. Orchard, III
Larissa A. McCalla
The Spence Law Firm, LLC
Spence & McCalla
15 S. Jackson St.
P.O. Box 548
Jackson, WY 83001
307-733-7290 Telephone
307-722-5248 Fax

ATTORNEYS FOR
PLAINTIFF

[Certificate omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TERRY HARRINGTON, Plaintiff, vs. POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON, Defendants.	)	No. 05-CV-00178
TERRY J. HARRINGTON, Plaintiff, vs. MATTHEW D. WILBER and POTTAWATTAMIE COUNTY, IOWA, Defendants.	)	No. 05-CV-90616 **REPLY TO HARRINGTON'S STATEMENT OF ADDITIONAL FACTS BY POTTAWATTAMIE COUNTY, AND PROSECUTORS HRVOL, RICHTER, AND WILBER**

CURTIS W. MCGHEE, JR., Plaintiff,	)	No. 05-CV-00255
vs.	)	
POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON, Defendants.	)	

COME NOW, Defendants, Joseph Hrvol, David Richter, Matthew Wilber, and Pottawattamie County; and, pursuant to Federal Rule of Civil Procedure 56, Local Rule 56.1(d), and the Court's July 27, 2005, Order Consolidating these matters for pre-trial purposes, submit their Reply to Harrington's Statement of Additional Facts.

1. Admit paragraphs 1 through 2.

3. Admit, but to qualify the assertion in that County Attorneys as attorneys in the State of Iowa are required to complete minimum legal education credits. The Attorney General's Office has the duty to provide such continuing legal education for County Attorneys according to Iowa Code Section 13.2.

4. Admit paragraphs 4 through 32.

33. Admit with qualification. According to the affidavit of Chad Primmer, the criminal file contained two of the purported missing reports. (See Primmer Affidavit and Supplemental Affidavit, Defendants' App. pp. 17-20).

34. Admit paragraphs 34 through 76.

77. Admit with qualification. Defendants admit plaintiff incorporates the findings of fact made by the Iowa Supreme Court but finds that an assertion requiring no response and objects to the incorporation by reference.

/s/
Kristopher K. Madsen PO1009763
Robert M. Livingston PO 16838
STUART TINLEY LAW FIRM, LLP
310 W. Kanesville Blvd., 2nd Floor
P. O. Box 398
Council Bluffs, Iowa 51502-0398
Telephone: (712) 322-4033
Facsimile: (712) 322-6243
ATTORNEYS FOR DEFENDANTS
POTTAWATTAMIE COUNTY, HRVOL,
RICHTER AND WILBER

/s/

David S. Baker
Daniel C. Estes
FISHER PATTERSON SAYLER & SMITH, LLP
51 Corporate Woods, Suite 300
9393 W. 110th Street
Overland Park, KS 66210

/s/

Margaret Popp Reyes
Assistant County Attorney
Pottawattamie County Attorney's Office
227 South 6th Street
Council Bluffs, Iowa 51501

[Certificate omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

CURTIS W. MCGHEE, JR.,	*	
	*	4:05-cv-00255
Plaintiff,	*	
	*	
v.	*	
	*	
POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON,	*	
	*	ORDER
Defendants.	*	
	*	
	*	
TERRY HARRINGTON, individually and in his capacity as the father of NICOLE ANTOINETTE HARRINGTON,	*	
	*	4:05-cv-00178
Plaintiff,	*	
	*	
v.	*	
	*	
COUNTY OF POTTAWATTAMIE, IOWA; CITY OF COUNCIL BLUFFS, IOWA; DAVID RICHTER, in his in-	*	

dividual and official capacities; JOSEPH HRVOL, in his individual and official capacities; DANIEL C. LARSEN, in his individual and official capacities; LYLE W. BROWN, in his individual and official capacities; and JOHN DOES ONE THROUGH NINE, in their individual and official capacities,	*	
	*	ORDER
Defendants.	*	

Before the Court are numerous pretrial motions filed by the parties. Each pending motion has been resisted by the opposing party, and the matters are fully submitted. The Court will address each motion in turn.

I. HARRINGTON'S RULE 104 MOTION FOR JUDICIAL ADMISSION OF FACT (HARRINGTON CLERK'S NO. 123) AND MCGHEE'S MOTION TO JOIN HARRINGTON'S MOTION (MCGHEE CLERK'S NO. 146)

The first motion pending before the Court is Harrington's Rule 104 Motion for Judicial Admission of Fact. Defendants filed a resistance to the motion on January 30, 2007. McGhee has requested to join in Harrington's Motion. No resistance was filed to McGhee's joinder request, and that motion (McGhee Clerk's No. 146) is, accordingly, granted. Plaintiffs argue that all facts admitted by Defendants with respect to the Defendants' various Motions for Judgment (including Motions for

Summary Judgment) should be considered judicial admissions at trial, such that further proof of those facts by Plaintiffs at trial will not be necessary. Specifically, Plaintiffs argue that Defendants Pottawattamie County, Richter, and Hrvol admitted all facts contained in Harrington's Statement of Additional Facts Precluding Summary Judgment (Harrington Clerk's No. 105.2); and Defendants City of Council Bluffs, Larsen, and Brown admitted those same facts by incorporating Pottawattamie County, Richter, and Hrvol's summary judgment pleadings by reference in their Motion for Judgment on the Pleadings and by failing to specifically deny the additional facts in their own pleadings. Defendants counter that the "admitted facts" were admitted only for purposes of the pending motions and cannot be deemed judicial admissions at trial.

In support of their contention that the referenced facts should be deemed judicial admissions, Plaintiffs cite this Court's ruling in *Americans United for Separation of Church and State v. Prison Fellowship Ministries,* 395 F. Supp. 2d 805, 809 (S.D. Iowa 2005). There, this Court found that a joint statement of stipulated facts submitted by the parties constituted a judicial admission for purposes of trial. *See Americans United,* 395 F. Supp. 2d at 809 (citing *State Farm Mut. Auto. Ins. Co. v. Worthington,* 405 F.2d 683, 686 (8th Cir.1968) ("The purpose of a judicial admission is that it acts as a substitute for evidence in that it does away with the need for evidence in regard to the subject matter of the judicial admission.")). In regards to admissions made in the context of summary judgment motions, the Court stated:

> Admissions made by a party, by formal

> means, in an adversarial process closely (in this case, meticulously) scrutinized by experienced attorneys, should not be lightly discarded on the grounds such admissions were made for the purposes of summary judgment. *See Frymire v. Peat, Marwick, Mitchell & Co.*, 1991 WL 66381 (N.D. Ill. April 22, 1991) (concluding, in an unreported case, that when a party placed itself in the position of asserting at the motion for summary judgment that certain facts exist without genuine dispute, that party is being disingenuous when it tried to argue such assertions could not be admitted at trial). If not made as a mere concession for the sake of argument, such statements are, after all, supposed to be the truth. If not, judicial proceedings at any stage are meaningless.

Id. Plaintiffs argue that Defendants here did not qualify their admissions with regard to Harrington's Statement of Additional Material Facts, and further argue that the reason for admission of those facts is particularly compelling in this case because of the procedural history of this case, i.e., because the Iowa Supreme Court made findings regarding Harrington's case based on an extensive record.

The Court recognizes that Defendants did not make a specific statement in its response to Harrington's Statement of Additional Material Facts that they were admitting those statements for purposes of summary judgment only. *See* Harrington Clerk's No. 112. Pottawattamie County, Hrvol,

and Richter did state, however, in their Brief in Support of Summary Judgment: "Assuming, *arguendo*, for purposes of summary judgment that the Plaintiff's factual allegations are undisputed, their claims against the Prosecutors and County fail as a matter of law because the Prosecutors are entitled to absolute, qualified, and sovereign immunity, and qualified privilege." *See* Harrington Clerk's No. 94.2 at 8. Additionally, in their Reply to Plaintiffs' Resistance to Motion for Summary Judgment, the Defendants again stated: "As Defendants have stated repeatedly throughout their Brief, the factual assertions made by Plaintiffs are assumed as they are stated for purposes of summary judgment." *See* Harrington Clerk's No. 115. Indeed, it was quite clear from Defendants' pleadings that their position on summary judgment was that, even assuming all of Plaintiffs' alleged facts as true, Defendants were still entitled to judgment as a matter of law because Defendants believed they were entitled to various forms of immunity.

In *Americans United*, this Court made a distinction between judicial and evidentiary admissions. With regard to statements of fact admitted during the summary judgment proceedings, the Court did not find such facts to be judicial admissions, except to the extent the parties had specifically stipulated to those facts pursuant to a pretrial order. Rather, the Court stated that it would deem summary judgment admissions as evidentiary admissions at trial, only to the extent that such admissions were made unequivocally and there was no showing of a change in material facts that would render the admission untrue. *Americans United*, 395 F. Supp. 2d at 809. Indeed, the Court specifically identified a situation similar to the present one where facts ad-

mitted for purposes of summary judgment would *not* be deemed admissible at trial: "For instance, it is conceivable a party would stipulate to a fact simply in order to make a concession for the purposes of summary judgment, that is, for the sake of argument. Of course, such intent must be made explicit when making the admission." *Id.* at 809 n.5.

The only place where Defendants did not explicitly state that they were admitting Plaintiffs' facts solely for purposes of summary judgment is in their response to Harrington's Statement of Additional Facts. While the Court could certainly find on that basis that the statements are judicial admissions, the Court declines to do so on the basis of what seems obvious by the record to be an inadvertent omission on the part of the Defendants.

Plaintiffs urge that if the statements are not deemed judicial admissions, they should be deemed evidentiary admissions under Federal Rules of Evidence 801(d)(2)(A), (d)(2)(B) and 401-03. Federal Rule of Evidence 801(d) provides that a statement is not hearsay, and is admissible at trial if the statement is: "offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(A-B). Plaintiffs argue that the admissions of fact by Defendants with respect to Harrington's Statement of Additional Facts "were not made *arguendo*, but were made as simple uncontested facts in the case." Again, viewing the record as a whole, the Court finds that Defendants' failure to specifically state that they were admitting Harrington's Statement of Material Facts solely for purposes of

the motion for summary judgment amounts to nothing more than an inadvertent omission. The present situation represents precisely the type of scenario the Court in *Americans United* foresaw as being a situation where admissions at the summary judgment stage should not be deemed admissions at trial.

II. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR CONVICTION (HARRINGTON CLERK'S NO. 129)

Harrington requests the Court exclude from trial all evidence pertaining or referring to Harrington's 1977 conviction for robbery, pursuant to Federal Rules of Evidence 404(b), 403, and 609. On May 26, 1977, Harrington (then aged 16) participated in a robbery by driving a vehicle while another youth robbed a convenience store. Less than $60.00 was taken and Harrington received $16.00 for his part in the crime. Harrington pleaded guilty to robbery. He was charged and convicted as an adult, despite his legal status as a minor at the time of the crime.

Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

> preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

Defendants argue that evidence of Plaintiff's prior conviction for robbery will not be offered as either character evidence under Rule 404 or impeachment evidence under Rule 609 (permitting some convictions to be admitted as evidence, subject to Rule 403, for the "purpose of attacking the character for truthfulness of a witness"). Rather, evidence of the prior conviction will be offered with regard to Harrington's claimed damages. Specifically, Harrington plans to call an expert named Stephen Skulsky, a Clinical Psychologist, to discuss Harrington's "despair . . . about a concern of who would hire him to work with their family [in light of Harrington taking classes in family sciences after his release from prison] given his prior conviction, even though it was overturned—for the murder of a retired police officer." Clerk's No. 151 (Defs. Resistance) at 2. Defendants argue that if Plaintiff was concerned about his vacated murder conviction, it is reasonable to think he should have been concerned about his conviction for robbery bearing on his ability to gain employment in his chosen field.

The Court finds that evidence of Harrington's prior conviction would be relevant to the issue of

damages if Plaintiff offers evidence that his conviction for Schweer's murder impaired his ability to find a job in his chosen field. The Court also recognizes that the danger of admitting evidence of Plaintiff's prior conviction is great, as a jury could mistakenly believe that evidence of Harrington's robbery conviction is somehow evidence that he had a propensity to commit murder. The Court believes, however, that the danger of unfair prejudice can be minimized by providing a limiting instruction to the jury that evidence of Plaintiff's prior conviction can only be considered on the issue of damages. Accordingly, should Defendants desire to offer such evidence to rebut and mitigate a claim by Plaintiff at trial that his conviction might impede his ability to get a career in family sciences, Defendants shall request permission of the Court, outside the presence of the jury, to offer such evidence. If at that time, the Court finds that evidence of Plaintiff's robbery conviction is sufficiently relevant to be admissible, it will permit the evidence and issue a limiting instruction. Under no circumstances should mention of the conviction be made without explicit advance Court permission given during the trial.

III. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF A SHOTGUN IN TERRY HARRINGTON'S VEHICLE (HARRINGTON CLERK'S NO. 130)

Harrington next requests the Court issue an order excluding from trial all evidence in any form that individuals saw a shotgun in the trunk or backseat of Harrington's vehicle prior to the Schweer murder. Plaintiff argues that there is no foundation for the admittance of such evidence, pursuant to Federal Rule of Evidence 901 ("The requirement of authen-

tication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Plaintiff also argues that the evidence is hearsay under Federal Rule of Evidence 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."). Finally, Harrington argues that evidence that he owned a shotgun is wholly irrelevant because the gun recovered from Harrington was not the weapon used to kill John Schweer.

Defendants counter that Harrington owned a .410 shotgun and testified that he never carried it in his car. Other witnesses, however, including Curtis McGhee, have stated that Harrington regularly carried and removed a shotgun from his car. Defendants claim that evidence pertaining to Harrington having a shotgun in his car is relevant to the "res gestae" of Defendants, i.e., the evidence is probative of why authorities investigated, arrested, and prosecuted Harrington. Specifically, Defendants claim that the evidence made it clear to them that Harrington had two guns, the .410 which he never kept in his car, and another that he did keep in his car.

Since a significant portion of Harrington's complaint is his allegation that police lacked probable cause to arrest him in the first instance, the Court must conclude that evidence that Harrington kept a shotgun in his trunk is relevant to what information was known to authorities and whether such information was sufficient to establish probable cause—both issues for the jury to determine.

With regard to Harrington's argument that there is no foundation for the admission of evidence pertaining to Harrington's possession of a shotgun, the Court is without sufficient information to permit it to make a ruling on the foundational objection at this time. With regard to the hearsay objection, the Court must conclude that such evidence could be admissible to demonstrate the legitimacy of Defendants' actions toward Plaintiff, to the extent that the evidence is not offered to demonstrate the truth of the matter asserted (i.e., Defendants cannot offer the evidence to show that Harrington did, in fact, carry a shotgun in the trunk of his car). Finally, to the extent Harrington argues that the evidence is more prejudicial than probative, the Court must disagree. As noted, the evidence is probative on the question of whether police had probable cause to suspect and arrest Harrington for the murder of John Schweer. Any potential prejudicial effect of the evidence (i.e., implying to the jury that because Harrington had a shotgun, he must have killed Schweer) can be mitigated by the issuance of an appropriate limiting instruction.

Since the exact contours of any potential shotgun evidence are undefined, the Court will ask that the parties refrain from mentioning any such evidence in the presence of the jury without first explaining to the Court the nature of the evidence and receiving a specific ruling. This will permit opposing counsel to lodge any specific foundational or other objections, and will permit the Court to make a more informed decision on the admissibility of such evidence, and to fashion a limiting instruction if needed.

IV. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE CURTIS MCGHEE'S STATEMENT THAT TERRY HARRINGTON POINTED A GUN AT HIM (HARRINGTON CLERK'S NO. 131).

Harrington's next motion seeks to exclude at trial all evidence that Terry Harrington pointed a gun at Curtis McGhee. Plaintiff argues that the only reason such evidence would be offered by the Defendants is to ask the jury to infer that if Terry Harrington pointed a gun at Curtis McGhee, he could certainly have pointed a gun at John Schweer. As with the prior motion, however, Defendants argue that McGhee's testimony is relevant because Harrington denied carrying his .410 shotgun in his car, but McGhee testified that Harrington pulled a shotgun out of the trunk of his car and pointed it at him. As discussed, *supra*, this evidence may well be relevant to the jury's determination of whether Defendants had probable cause to suspect and arrest Harrington for Schweer's murder. As with the Court's generalized ruling on the admissibility of shotgun evidence above, however, the Court will entertain specific objections prior to this evidence being presented to the jury, and will issue an appropriate limiting instruction, if necessary. Accordingly, the parties should refrain from mentioning McGhee's testimony that Plaintiff pointed a shotgun at him until it receives a ruling at trial from the Court on the matter.

V. DEFENDANTS' MOTION IN LIMINE WITH REGARD TO ANTICIPATED TESTIMONY OF PLAINTIFF CURTIS MCGHEE (HARRINGTON CLERK'S NO. 133; MCGHEE CLERK'S NO. 151)

Defendants request an order precluding Plaintiff Curtis McGhee from offering testimony concerning statements allegedly made by unidentified staff

members of the Pottawattamie County Jail following his conviction. Specifically, Defendants object to any testimony that staff members purportedly called McGhee a "cop killer," a "nigger," or threatened to have unknown associates "waiting on you [McGhee] when you get to Iowa," on the basis that such testimony is hearsay. Both Plaintiffs counter that such testimony is not hearsay and is relevant to demonstrate the racially biased and derogatory treatment they received as a result of their wrongful incarceration.

The Court agrees with Plaintiffs that the testimony may be relevant to Plaintiffs' damages and that the testimony cannot be barred by the hearsay rule. Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is clear that Plaintiffs do not seek to offer the statements of the unknown jail staff to demonstrate that he was, in fact and truth, a "cop killer," a "nigger," or that the jail staff would actually have unknown associates "waiting for" McGhee. Accordingly, Defendants' motion is denied.

VI. DEFENDANTS' MOTION IN LIMINE REGARDING ANTICIPATED TESTIMONY OF CARL WRIGHT (HARRINGTON CLERK'S NO. 134; MCGHEE CLERK'S NO. 152)

Defendants seek to exclude from trial any evidence by Plaintiffs' witness Carl Wright that race played a role in the filing of criminal charges against the Plaintiffs for the murder of John Schweer. Mr. Wright was Terry Harrington's former football coach and will be offered as a lay witness to testify to his

belief that he was with Terry Harrington at the time Schweer was murdered. At deposition, Mr. Wright also commented that he believes that the fact that Terry Harrington was a young, black male at the time of the events giving rise to this case played an important factor in his conviction.

Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and © not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. "Personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience, is a sufficient foundation for lay opinion testimony." *Burlington N. Ry. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986). Defendants argue that Mr. Wright gave an "off the cuff opinion" about the role he believed race played in the filing of criminal charges against Harrington, but did not identify any factual inquiries or observations he had to support his opinion. Plaintiffs counter, however, that Mr. Wright can testify about his own inferrences drawn from his perception of racial issues at the time.

The Court believes that if an adequate factual foundation is laid for Mr. Wright's opinion, that it *may* be admissible. However, based on the information currently known to the Court, there is insufficient evidence of the basis of Mr. Wright's knowledge to permit his testimony at this time. Defendants' motion is, therefore, preliminarily granted. The Court will, however, entertain an offer of proof made outside the presence of the jury to determine if Mr. Wright does, in fact, have a sufficient basis of personal knowledge to opine about whether race played a factor in the arrest and conviction of Plaintiffs for Schweer's murder. Until such an offer of proof and ruling is complete, however, the parties shall refrain from discussing Mr. Wright's opinion testimony in the presence of the jury.

VII. DEFENDANTS' MOTION IN LIMINE RE: REPRESENTATION OF PRIMMER (HARRINGTON CLERK'S NO. 137; MCGHEE CLERK'S NO. 157)

Defendants request an order barring Plaintiffs from offering evidence that Defendant David Richter represented Chad Primmer in a case involving allegations of rape (and potentially others allegations). Chad Primmer represented Plaintiff Curtis McGhee during his first year of legal practice while Mr. Richter was serving as the Pottawattamie County Attorney. Defendants urge that such evidence is not probative of any fact in the case, or that if the evidence is probative, its probative value is substantially outweighed by its prejudicial effect. Plaintiffs resist the motion and argue that the evidence is admissible to establish the biased relationship between Mr. Primmer and Mr. Richter. This is

important, Plaintiffs claim, because Primmer is expected to testify on behalf of the Defendants at trial regarding his representation of Curtis McGhee, including the negotiations that took place regarding McGhee's plea agreement and regarding evidence and reports contained in the criminal file obtained from McGhee's trial counsel.

Plaintiffs are entitled to challenge the credibility of witnesses by showing their biases or prejudices.

> The credibility of witnesses is always a material issue, so the only question of materiality or relevance when evidence is offered to impeach for bias is whether the evidence tends in reason to demonstrate the existence of some fact, state of mind or condition that a reasonable person would take into account in assessing the credibility of the witness under attack. As we pointed out above, the balance must be weighed in favor of admissibility where impeachment for bias is the object.

Johnson v. Brewer, 521 F.2d 556, 561 (8th Cir. 1975). The Court believes the fact that a witness at trial who at one point represented a Plaintiff, but at a prior point was represented himself by a Defendant, could lead a reasonable jury to question the credibility of that witness' testimony. Accordingly, the Court will permit Plaintiffs to ask Mr. Primmer generally about Mr. Richter's previous representation of him. The Court believes this can be accomplished, however, without referencing the precise nature of the charges involved. Rape and similar allegations

are highly inflammatory, and may encourage the jury to make credibility findings about Mr. Primmer on the basis of the charges against him (charges which were ultimately dismissed), rather than on the legitimate basis of his relationship with Mr. Richter.

VIII. DEFENDANTS' MOTION IN LIMINE RE: LIABILITY INSURANCE (HARRINGTON CLERK'S NO. 138; MCGHEE CLERK'S NO. 158)

Defendants next ask the Court to bar from trial all evidence of and references to liability insurance, self-insurance, or risk pool enrollment. Federal Rule of Evidence 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Fed. R. Evid. 411. Plaintiff requests that the Court deny the Defendants' motion to exclude evidence of liability insurance, self-insurance, or risk pool enrollment to the extent that such evidence is admissible under the exception for the admissibility of such evidence under Rule 411. Plaintiffs do not, however, articulate how this evidence is likely admissible in the present case. Accordingly, the Court preliminarily grants Defendants' motion. Should Plaintiffs find it necessary to offer evidence of liability insurance, self-insurance, or risk pool enrollment for a permissible purpose during the trial, they shall

petition the Court to offer such evidence outside the presence of the jury and before the introduction of such evidence.

IX. DEFENDANTS' MOTION IN LIMINE RE: COMPROMISE AND OFFERS TO COMPROMISE (HARRINGTON CLERK'S NO. 139; MCGHEE CLERK'S NO. 159)

Defendants move in limine for an order excluding from trial all evidence of and references to compromise, offers to compromise, or conduct or statements made in compromise negotiations or settlement conferences by Defendants. Federal Rule of Evidence 408 provides:

> (a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered

> in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses.—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

As with their resistance to Defendants' request to bar evidence of liability insurance, Plaintiffs ask that the Court deny the Defendants' motion to exclude evidence of settlement negotiations to the extent such evidence is permissible under Rule 408. Again, Plaintiffs do not articulate the context in which such evidence is likely to arise in the present case. Accordingly, the Court preliminarily grants Defendants' motion. Should Plaintiff find it necessary to offer evidence of offers to compromise or settlement negotiations for a permissible purpose during the trial, they shall petition the Court to offer such evidence outside the presence of the jury and before the introduction of such evidence.

X. DEFENDANTS' MOTION IN LIMINE RE: IMMUNIZED ACTS (HARRINGTON CLERK'S NO. 141; MCGHEE CLERK'S NO. 161)

Defendants next move in limine for an order prohibiting Plaintiffs from offering evidence of or referring to any acts of the Defendants held immune by the Court. Defendants' motion was filed prior to this Court's ruling on the parties' dispositive motions. As such, the motion and supporting brief do not specify any particular matters that should be deemed barred in light of the Court's ultimate ruling on immunity. Accordingly, the motion is denied. Defendants may, however, request at trial that the Court limit the use of certain evidence in accordance with the Court's ruling on the dispositive motions.

XI. MCGHEE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF 1985 PRISON DEMONSTRATION (MCGHEE CLERK'S NO. 155)

McGhee asks the Court to exclude from admission at trial any evidence of his participation in a 1985 demonstration at the Nebraska Penal Complex. Apparently, McGhee served a portion of his life sentence for the first-degree murder of John Schweer at the Nebraska Penal Complex in Lincoln, Nebraska, pursuant to an interstate compact. In 1985, McGhee was transferred to Fort Madison because of his alleged involvement in an inmate demonstration protesting prison conditions. McGhee claims that inmates with knives prevented him from leaving the yard during this incident. McGhee's involvement in the incident was never adjudicated.

Defendants resist McGhee's motion and argue that evidence dealing with the nature of McGhee's

confinement, the conditions of his confinement, his places of confinement, and the reasons for that confinement are admissible since Plaintiff is presumably requesting damages incurred as a result of his confinement. The Court does not believe that it possesses sufficient information at this juncture to make an informed ruling on the admissibility of the evidence. At this time, then, the Court orders that the parties shall refrain from discussing the 1985 inmate demonstration in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages McGhee presents at trial, that questioning about the 1985 inmate demonstration is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XII. MCGHEE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF 1987 PRISON DISCIPLINE (CLERK'S NO. 154)

McGhee next moves to exclude from admission at trial any evidence of discipline McGhee received in 1987 while in prison in Fort Madison. Specifically, in 1987, Mcghee was disciplined for his alleged involvement in a conspiracy to take staff hostage, kill them, and escape. McGhee denies he was involved in any such scheme.

Defendants resist McGhee's motion on the same basis that it resisted his motion to exclude evidence of the 1985 inmate demonstration, that is, Defendants argue that evidence dealing with the nature of McGhee's confinement, the conditions of his confinement, his places of confinement, and the reasons for that confinement are admissible since Plaintiff is presumably requesting damages in-

curred as a result of his confinement. As with the prior motion, the Court does not believe that it possesses sufficient information at this juncture to make an informed ruling on the admissibility of the evidence. At this time, then, the Court orders that the parties shall refrain from discussing the 1987 disciplinary matter in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages McGhee presents at trial, that questioning about the 1987 disciplinary matter is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XIII. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE IOWA DEPARTMENT OF CORRECTIONS RECORDS AND PARTIALLY JOIN IN PLAINTIFF MCGHEE'S MOTION IN LIMINE TO EXCLUDE 1987 PRISON DISCIPLINE (HARRINGTON CLERK'S NO. 142)

Harrington asks the Court to exclude from trial any evidence of Mr. Harrington's Iowa Department of Corrections file, as well as any reference to its contents. Harrington also joins in McGhee's request to exclude evidence of a 1987 disciplinary proceeding. According to Harrington, he was implicated in the same hostage plot as McGhee, however, there was no evidence that he was actually involved in any way. Harrington's only punishment was a reprimand for speaking briefly with others who were suspects.

As with the previous two motions, Defendants resist Harrington's motion because they argue that all evidence regarding Plaintiffs' confinement is relevant to the issue of damages. As the Court has pre-

viously stated, it lacks sufficient information to make an informed ruling on the motion at this juncture. Accordingly, the parties shall refrain from discussing the 1987 disciplinary matter and Harrington's Iowa Department of Corrections file in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages Harrington presents at trial, that questioning about such matters is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XIV. CONCLUSION

For the reasons stated herein, the Court makes the following rulings on the parties' pending motions:

- Harrington's Rule 104 Motion for Judicial Admission of Fact (Harrington Clerk's No. 123) is DENIED.
- McGhee's Motion to Join Harrington's Motion (McGhee Clerk's No. 146) is GRANTED.
- Harrington's Motion in Limine to Exclude Evidence of Prior Conviction (Harrington Clerk's No. 129) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Evidence of a Shotgun in Terry Harrington's Vehicle (Harrington Clerk's No. 130) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Curtis McGhee's Statement that Terry Har-

rington Pointed a Gun at Him (Harrington Clerk's No. 131) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.

- Defendants' Motion in Limine with Regard to Anticipated Testimony of Plaintiff Curtis McGhee (Harrington Clerk's No. 133; McGhee Clerk's No. 151) is DENIED.
- Defendants' Motion in Limine Regarding Anticipated Testimony of Carl Wright (Harrington Clerk's No. 134; McGhee Clerk's No. 152) is GRANTED, however upon an offer of proof at trial, the Court will reevaluate the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Representation of Primmer (Harrington Clerk's No. 137; McGhee Clerk's No. 157) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Defendants' Motion in Limine Regarding Liability Insurance (Harrington Clerk's No. 138; McGhee Clerk's No. 158) is GRANTED, however upon an offer of proof at trial, the Court will reevaluate the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Compromise and Offers to Compromise (Harrington Clerk's No. 139; McGhee Clerk's No. 159) is GRANTED, however upon an offer of proof at trial, the Court will reconsider the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Immunized Acts (Harrington Clerk's No.

141; McGhee Clerk's No. 161) is DENIED as premature and incomplete.

- McGhee's Motion in Limine to Exclude Evidence of 1985 Prison Demonstration (McGhee Clerk's No. 155) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- McGhee's Motion in Limine to Exclude Evidence of 1987 Prison Discipline (McGhee Clerk's No. 154) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Iowa Department of Corrections Records and to Partially Join in Plaintiff McGhee's Motion in Limine to Exclude 1987 Prison Discipline (Harrington Clerk's No. 142) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.

IT IS SO ORDERED.

Dated this 27th day of February, 2007.

/s/
ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT